1998

James K. Rawson and Rebecca R. Rawson v. Kim Edward Conover and Karen Jane Conover : Brief of Appellee

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH 980298-CA

JAMES K. RAWSON, Trustee, and REBECCA R. RAWSON, Trustee, Plaintiffs/Appellants, vs. KIM EDWARD CONOVER and KAREN JANE CONOVER, a Utah General Partnership, dba K&K SALES; KIM EDWARD CONOVER, dba K&K SALES; K&K SALES, INC., a corporation; KIM EDWARD CONOVER, dba K&K SALES, INC.; PAUL W. CLARK; and OLD REPUBLIC SURETY CO., a corporation, Defendants/Appellees.	Court of Appeals No. 980298CA **ARGUMENT PRIORITY 15**

BRIEF OF APPELLEES

On Appeal From the Orders of the Third Judicial District Court of Salt Lake County, Judge Pat B. Brian and and Judge Glen K. Iwasaki

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Statutes and Rules

JURISDICTION

The Utah Supreme Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996 Supp.). Following transfer from the Utah Supreme Court, the Utah Court of Appeals has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996 Supp.).

STATEMENT OF ISSUES

A. ISSUES FOR REVIEW.

1. Did the District Court properly dismiss Rawsons' claims of fraud, tortious misrepresentation, deceptive and unconscionable sales practices, punitive damages and equitable estoppel from Rawsons' Amended Complaint pursuant to Defendants' [First] Motion for Partial Summary Judgment because of a lack of any evidentiary support therefor?

2. Did the District Court properly dismiss Rawsons' claims of breach of warranty from Rawsons' Amended Complaint pursuant to Defendants' [Second] Motion for Partial Summary Judgment because no legally recognizable warranties were made to Rawsons?

B. STANDARD OF REVIEW.

This matter is on appeal from two separate orders of summary judgment issued by two separate judges of the Third District Court, both in favor of Defendants and against Rawsons. In reviewing a grant of summary judgment, the appellate court views the facts in light most favorable to the non-moving party. Mountain States

Telephone & Telegraph Co. v. Garfield County, 811 P.2d 184, 192 (Utah 1991). In deciding whether a district court properly granted judgment as a matter of law to the prevailing party, the appellate court reviews the correctness of the trial court's conclusions of law. Winegar v. Froerer Corp., 813 P.2d 104, 197 (Utah 1991). However, an appellate court may affirm the grant of summary judgment on any ground available to the trial court, even if it is not the one upon which relief was granted below. Higgins v. Salt Lake County, 855 P.2d 231, 135 (Utah 1993).

DETERMINATIVE STATUTES AND RULES

UTAH CODE ANNOTATED

TITLE 13, CHAPTER 11, CONSUMER SALES PRACTICES

§13-11-2 Construction and Purposes of Act.

This act shall be construed liberally to promote the following policies:

(1) to simplify, clarify, and modernize the law governing consumer sales practices;

(2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;

(3) to encourage the development of fair consumer sales practices;

(4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;

(5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and

(6) to recognize and protect suppliers who in good faith comply with the provisions of this act.

§13-11-4(2)[part] Deceptive Act or Practice by Supplier.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance

characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

. . .

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representative, if it has not;

. . .

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

§13-11-5 Unconscionable Act or Practice by Supplier.

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

§13-11-19(2) Actions by Consumer.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court costs.

TITLE 41, CHAPTER 3, MOTOR Vehicle BUSINESS REGULATION

§41-3-404(1) Right of Action Against Dealer, Salesperson, Crusher, Body Shop, or Surety on Bond.

(1) A person may maintain an action against a dealer, crusher, or body shop on the corporate surety bond if:

(a) the person suffers a loss or damage because of:

(i) fraud;

(ii) fraudulent representation; or

(iii) a violation of:

(A) this chapter;

(B) any law respecting commerce in motor Vehicles; or

(C) a rule respecting commerce in motor Vehicles made by a licensing or regulating authority; and

(b) the loss or damage results from the action of:

(i) a licensed dealer;

(ii) a licensed dealer's salesperson acting on behalf of the dealer or within the scope of the salesperson's employment;

(iii) a licensed crusher; or

(iv) a body shop.

(2) Successive recovery against a surety on a bond is permitted, but the total aggregate annual liability on the bond to all persons making claims may not exceed the amount of the bond.

(3) A cause of action may not be maintained against any surety under any bond required under this chapter except as provided in Section 41-3-205.

TITLE 70A, CHAPTER 2, SALES

§70A-2-202 Final Written Expression - Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 70A-1-205) or by course of performance (Section 70A-2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

§70A-2-316[part] Exclusion or Modification of Warranties.

. . .

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

UTAH RULES OF CIVIL PROCEDURE

RULE 56(c) Summary Judgment

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On October 14, 1992, Clark and Conover attended an auto auction with the intent of finding a vehicle for Clark's family. Conover, who was a licensed motor vehicle dealer, purchased a 1989 Ford Aerostar Van (the "Vehicle") in his business name of K&K Sales. The Vehicle had been "totaled" in an accident in August of 1992 and was sent to "salvage." Clark and Conover intended to have Clark purchase the Vehicle from K&K Sales after it had been repaired and restored for his personal use. Until then title remained in K&K Sales. For a period of 10 months, Clark and Conover contracted with third-party contractors to restore the Vehicle. Upon substantial restoration of the Vehicle, Clark's wife test drove the Vehicle and determined that it was too long for her

use. Rather than purchasing the restored Vehicle, Clark agreed to find a new purchaser.

Just prior to August 3, 1993 Clark showed the Vehicle to Rawsons and explained to them that the Vehicle had previously been in a wreck that totaled the car. Clark also told them that he had contracted for the Vehicle to be rebuilt and repaired by third parties and that he believed it was safe. He offered to allow Rawsons to have the Vehicle inspected by their personal mechanic, but they declined. Pursuant to their agreement, Clark had the Vehicle safety inspected and obtained a Certificate of Compliance. Rawsons purchase the Vehicle for $9,000 and executed three documents clearly acknowledging (1) the salvage and rebuilt nature of the Vehicle and, (2) the fact that the Vehicle was being purchased "AS IS" and "without warranties." The Certificate of Title given to Rawsons also included the statutory "Rebuilt/Restored" disclosure.

Four months and 3,500 miles after Rawsons' purchase of the Vehicle, Rawsons were involved in another accident damaging the Vehicle. There are no allegations that any defect in the Vehicle caused the accident. After the Vehicle was declared "totaled" Rawsons filed a Complaint against Defendants asserting claims for fraud, tortious misrepresentations, breach of warranty, breach of covenant of good faith, deceptive sales practices, punitive damages and equitable estoppel. Defendants denied any liability based on the written instruments executed by Rawsons and on Defendants' lack of culpability on the other counts. On May 31, 1996, Defendants

filed a Motion for Summary Judgment which was briefed and argued by counsel before the Honorable Pat B. Brian. Judge Brian entered an order on October 4, 1996 dismissing all claims except those for breach of warranty and the claim against the surety.

Following Judge Brian's Order, the matter was transferred to the Honorable Glen K. Iwasaki. Defendants took the depositions of Rawsons to discover the extent and basis for their warranty claims. Based on the new deposition testimony on March 8, 1998, Defendants renewed their Motion for Summary Judgment on the basis that no express warranties had been made and that all implied warranties had been knowingly waived. The motion was again briefed and argued by counsel. On May 28, 1998, Judge Iwasaki issued on Order dismissing the remainder of Rawsons' Complaint. On or about June 23, 1998 Rawsons filed their Notice of Appeal on both Judge Brians' Order and Judge Iwasaki's Order.

STATEMENT OF MATERIAL FACTS

In the Statement of Facts section of the Brief of Appellants (hereinafter "Appellants' Brief"), numerous statements of "facts" are listed, most of which are argumentative and conclusory rather than objectively factual in nature. Furthermore, Defendants have serious dispute with the accuracy of many of said "facts" and have discovered that the Record citations used in Appellants' Brief are generally misleading and in many cases unsupported. Therefore Defendants submit the following Statement of Facts as supported by the Record.

1. K & K Sales was the trade name of a business owned and operated by Kim Edward Conover (hereinafter "Conover"). (R. 184, ¶ 2).

2. Paul W. Clark (hereinafter "Clark") is a commercial air pilot and has never been an employee of Conover, K & K Sales, or K & K Sales, Inc. (R. 185, ¶ 4; R. 200, ¶ 2; Deposition of Clark, R. 398-399, page 4 line 19 through page 6 line 22).

3. On or about October 14, 1992, Defendants Paul W. Clark (hereinafter "Clark") and Conover attended an auto auction, at which time Conover, through his business entity, K & K Sales, purchased for Clark from Western Auto Wrecking, Inc., a "salvage" 1989 Ford Aerostar Van motor Vehicle (the "Vehicle"). (R. 201, ¶ 3; R. 185, ¶¶ 6,7).

4. At the time of the purchase, Clark and Conover were informed that the Vehicle had suffered structural damage in an accident occurring in August 1992. (R. 185, ¶8; R. 201, ¶ 4).

5. It was the intent of Clark and Conover to have Clark purchase the Vehicle from K & K Sales after it was repaired and restored for the personal and family use of Clark's wife. Title remained in the name of K & K Sales throughout the repair period. (R. 185-186, ¶ 9; R. 201, ¶ 5).

6. Over the next 10 months subsequent to the acquisition of the Vehicle, Clark and Conover contracted with various professional parts and repair shops, licensed to perform such work, for the restoration of the Vehicle. (R. 186, ¶ 10; R. 210, ¶ 6).

7. Neither Clark nor Conover performed any of the body work or structural repair work on the Vehicle. Neither did they supervise the work or inspect the Vehicle while the repair work was in process. (R. 186, ¶ 11; R. 201, ¶ 7).

8. Upon substantial completion of the repairs to the Vehicle, Mrs. Clark test drove the Vehicle, and determined that it was too long for her to easily maneuver, and did not want to keep the Vehicle. (R. 186, ¶ 12; R. 201, ¶ 8).

9. In lieu of taking title to the Vehicle from K & K Sales, Clark agreed to obtain a purchaser for the Vehicle. (R. 186, ¶ 13).

10. Prior to August 3, 1993, Clark showed the Vehicle and offered to sell same to Rawsons. (R. 201, ¶ 9; Deposition of James Rawson, R. 360-361, page 10 line 1 through page 16 line 20).

11. Prior to the sale of the Vehicle to Rawsons, Clark verbally explained to them that the Vehicle had been involved in an accident and was rebuilt from salvage. (R. 202, ¶ 10; Deposition of James Rawson, R. 361, page 13 line 3 through page 14 line 25).

12. Prior to their purchase of the Vehicle, Rawsons knowingly acknowledged in writing that the Vehicle was a rebuilt salvage Vehicle with the following instruments:

a. The Dealer Registration Record dated August 3, 1993 and signed by James K. Rawson, Trustee, provides that the "Evidence of Ownership" would be by a "*Utah Salvage Title*" and that the transaction was of a "*Rebuilt*" Vehicle (Appellants' Addendum B, page 5 (more legible at R. 207));

b. The Purchase Agreement (referred to by Appellants' as "Motor Vehicle Contract of Sale") dated August 4, 1993 and signed by James K. Rawson, Trustee, provides that "*Vehicle is a rebuilt salvage*", that "*The Vehicle covered by this agreement may be a rebuilt or restored Vehicle as defined by U.C.A. §41-1-36.5(1) and § 41-1-36.6(9). Purchaser acknowledges that this has been disclosed and that purchaser has seen the previous title or salvage certificate*", that "*Purchaser warrants that he has inspected the Vehicle to his satisfaction and purchases the Vehicle '**AS IS**'" and that "The Vehicle is sold **AS IS** and purchaser is solely responsible for making necessary inspections*". (Appellants' Addendum B, pages 1-2 (more legible at R. 208-209)).

c. The Buyers Guide dated August 4, 1993 and signed by James K. Rawson, Trustee, provides "*Vehicle is a rebuilt salvage title*", that the Vehicle was being sold "***AS IS - NO WARRANTY*** *YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the Vehicle.*" The Buyers Guide also includes a ½ page itemizing "major defects" which could occur, which include: "***Frame & Body:*** *Frame-cracks, corrective welds, or rusted through*" and "***Suspension:***... *Structural parts bent or damaged...*". (Appellants' Addendum B, pages 3-4 (more legible at R. 210-211)).

(Deposition of James Rawson, R. 362-365, page 18 line 1 through page 32 line 19).

13. Clark gave a copy of each of the foregoing documents to Rawsons upon completion of the sale. (R. 187, ¶ 15(c); R. 203, ¶ 11(c).

14. Prior to the purchase and sale of the Vehicle, Clark offered Rawsons the opportunity to take the Vehicle to an auto repair shop of their choice, so long as Clark could accompany the Vehicle. Rawsons declined the offer. (R. 203, ¶ 12; Deposition of James Rawson, R. 361, page 14 line 17 through page 15 line 9; Deposition of Rebecca Rawson R. 371, page 17 line 23 through page 18 line 25).

15. Prior to the purchase and sale of the Vehicle, Clark obtained a State Safety Inspection of the Vehicle, pursuant to which a Certificate of Compliance was provided by Burt Brothers Tire & Service located in Bountiful, Utah. (R. 203, ¶ 13; R. 213).

16. According to Rawsons, neither Clark nor Conover made any affirmative warranties or representations concerning the Vehicle other than (1) the Vehicle had been in an accident; (2) the Vehicle had been repaired; and (3) the Vehicle was safe for normal use. (Deposition of James Rawson, R. 366, page 33 line 11 through page 36 line 20; Deposition of Rebecca Rawson, R. 406, page 19 line 4 through page 19).

17. Neither Clark nor Conover had any actual knowledge or reason to know of any defects in the repairs which had been performed to the Vehicle. (R. 187, ¶16; R. 203, ¶ 14).

18. The title given to Rawsons upon the sale of the Vehicle was marked "REBUILT/RESTORED" on four lines in full compliance with

the Utah Statute on Salvaged Vehicles, U.C.A. § 41-1a-1004(2). (R. 187-188, ¶ 17; R. 203, ¶ 15; R. 318).

19. Following the purchase of the Vehicle by Rawsons, the Rawsons used the Vehicle for approximately four months, driving same approximately 3,500 miles, without complaint. (R. 179; Transcript of Proceeding, R. 455 page 12).

20. On or about December 11, 1993, Rawsons were in an automobile accident near Kanesville, Utah, which accident was in no part caused any defect to the Vehicle. (R. 179; Transcript of Proceeding, R. 455 page 12).

SUMMARY OF ARGUMENT

Judge Brian's Order dismissing all counts of Rawsons' Complaint other than those for breach of warranty and a claim against the surety was the only possible ruling given the limited evidence produced in opposition to Defendants' motion. Rather than specifying particular conduct of Defendants which Rawsons found objectionable, they opposed Defendants' Motion by generally asserting, without factual or legal basis, that Defendants knew or should have known that latent defects existed following the third-party repairs of the Vehicle. No specific violations of the generally cited Utah statutes, and no particular conduct Defendants identified was in either the Amended Complaint or the resistance to Summary Judgment. Rule 56(c) required Judge Brian to dismiss all claims other than those relating to alleged warranties ambiguously raised by Rawsons.

Even reviewing the new factual issues raised for the first time on this Appeal, Rawsons have failed to show by the Record that the Defendants (1) have violated any of the provisions of the Utah Sales Practices Act, the Utah Motor Vehicle Regulatory Act or the Utah Consumer Code, or (2) have caused any damage to Rawsons as a consequence of said alleged violations. The damages suffered by Rawsons, if any, were caused by an accident unrelated to Defendants or any alleged latent defect in the Vehicle.

Rawsons' deposition testimony unambiguously removes any claim of breach of warranty by Defendants. Rawsons both acknowledged their clear understanding that the Vehicle they were going to purchase (1) had been in an accident totaling the Vehicle and causing structural damage, (2) was being sold "as is" and "without warranty" and (3) had been repaired by licensed independent third-party contractors. The parol evidence rule and the unambiguous integration clause in the Purchase Agreement prohibit Rawsons from avoiding the clear disclaims of warranty.

Rawsons have consistently attempted to avoid the legal effect of the acknowledgements, waivers and consents freely and knowingly signed by Rawsons, but have failed to provide legal support of those attempts. Full and complete disclosure by Defendants, together with their exacting compliance with Federal Trade Commission's regulations and the Utah Salvage Vehicle statutes correctly place the risk of Rawsons' loss back upon Rawsons.

The Orders of Judge Brian and Judge Iwasaki dismissing Rawsons' claims should be affirmed by this Court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED RAWSONS' UNSUPPORTED CLAIMS IN ITS ORDER OF OCTOBER 4, 1996.

In their Amended Complaint, Rawsons alleged eight separate causes of action:

Count I: Intent to Defraud;

Count II: Tortious Misrepresentations;

Count III: Deceptive and Unconscionable Acts and Practices;

Count IV: Reach of Express and Implied Warranty;

Count V: Breach of Covenants of Good Faith and Fair Dealing;

Count VI: Liability of Old Republic [Surety liability];

Count VII: Punitive Damages [Exempting Old Republic]; and

Count VIII: Equitable Estoppel.

Only in Count III, did they make even general claims that the Defendants had violated the provisions of one federal and several state statutes: (1) Federal Vehicle Information and Cost Savings Act [U.S.C. §§ 1980, et seq.]; (2) Utah Consumer Sales Practices Act [Utah Code Ann. § 13-11-1 et seq.] (hereinafter the "Sale Practices Act"); (3) Utah Motor Vehicle [Business Regulation] Act [Utah Code Ann. §§ 41-3-101 et seq.] (hereinafter the "Motor Vehicle Reg. Act"); and (4) Utah Commercial Code [Utah Code Ann. §§ 70A-2-101 et seq.] (hereinafter the "UCC"). No specific statutory citation was given by Rawsons concerning any particular allegation in the Amended Complaint, nor in any of their opposition memoranda filed in response to Defendants' Motions for Summary Judgment. Rather, the title to each statutory act cited by Rawsons

constituted the entirety of the description of the specific standards allegedly breached by Defendants.

According to all of Rawsons' pleadings filed prior to the issuance of the District Court's dismissal Orders, the Defendants' conduct which allegedly violated some or all of the above referenced statutes creating the causes of action as described in the Amended Complaint was limited to the following:

(1) Causing the Vehicle to be repaired in a defective and dangerous manner;

(2) Misrepresenting to Rawsons that the Vehicle had been properly repaired;

(3) Failing to disclose to Rawsons that the Vehicle had suffered severe structural damage in a prior accident; and

(4) Misrepresenting the actual mileage of the Vehicle which was allegedly different from that set forth on the odometer.[1]

No other facts, allegations, or implications were offered by Rawsons that Defendants had done any other act which constituted a violation of any of their cited statutory Acts.

In the Appellants' Brief, for the first time in this litigation, Rawsons now attempt to allege other conduct of Defendants which if proven accurate may constitute technical violations of one or more of the generally cited statutory Acts. Rawsons are not entitled to raise such allegations and claims at

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[1] By earlier Stipulation and Order of the District Court the allegations and claims concerning the violation of any of the provisions of the Federal Motor Vehicle and Cost Savings Act of 1972 were dismissed, and are not the subject of this appeal.

this point in the judicial process. "It is black-letter law that an appellate court will not address issues raised for the first time on appeal except in extraordinary circumstances . . .." State v. Smith, 866 P.2d 532, 533 (Utah 1993). That "black-letter" law is equally applicable in civil as well as criminal cases. See Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996); DeVore v. IHC Hospitals, 884 P.2d 1246, 1250-1251 (Utah 1994).

A. Rawsons failed to introduce any factual evidence to support their claim that Defendants violated the Sales Practices Act.

The Sales Practices Act provides for the potential private enforcement of any violation of the Act, including the possible collection of a reasonable attorney's fee. Utah Code Ann. § 13-11-19 (1996 Repl.) However, in order to recover, the plaintiff must show that the conduct of a "supplier" constituted either a deceptive or unconscionable act and that such conduct "results" in a loss suffered by a consumer.

Until the filing of their Appellants' Brief Rawsons had failed to specify which if any of the specific "deceptive" descriptions set forth in the Act fit the alleged conduct identified in the Amended Complaint. Through the new assertions of the Brief, Defendants know understand that Rawsons rely on subsections (a), (b), (c), (e), and (j) of Utah Code Ann. § 13-11-4.

The fact that at the time of Rawsons' purchase the Vehicle was "used," "rebuilt," and "salvage" was acknowledged in writing by Rawsons on three separate documents. (Appellants' Addendum, pages 1-2, 3-4, 5). Both Rawsons acknowledged in their respective

depositions that they were informed of the salvage and rebuilt nature of the Vehicle prior to their purchase. (Deposition of James Rawson, R. 361, page 13 line 3 through page 14 line 11; Deposition of Rebecca Rawson, R. 370, page 16 lines 6 through 14). Any allegations that the standard, grade, or quality of the Vehicle were misrepresented are without factual basis and of dubious integrity. Clearly, the language of the Buyers Guide delivered to Rawsons, "**AS IS - NO WARRANTY**" should absolve Defendants from any liability for failure to disclose Defendants' intent not to provide a warranty for the Vehicle. There are no provisions of the Act that describe Defendants' conduct about which Rawsons complain - the failure to know and disclose the quality of the repairs which were made to the Vehicle by independent commercial third parties. If the actions of Defendants don't fit within the description of "deceptive" conduct, it would be illogical to label them as "unconscionable" under section 5 of the act. Whether or not an act is unconscionable is a question of law for the court. That determination was properly made by the District Court after consideration of the setting, purpose and effect of the transaction. Utah Code Ann. § 13-11-5(2).

It is important to review all of the purposes of the Sales Practices Act in construing the conduct of suppliers as violative thereof. Section 13-11-2 provides:

> This Act shall be construed liberally to promote the following policies:
> (1) to simplify, clarify and modernize the law governing consumer sales practices;

(2) **to protect consumers from suppliers who commit deceptive and unconscionable sales practices;**

(3) to encourage the development of fair consumer sales practices;

(4) **to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;**

(5) to make uniform the law, including the administrative rules, with respect to the subject of this act among the states which enact similar laws; and

(6) **to recognize and protect suppliers who in good faith comply with the provisions of this act.**

(Emphasis added.) According to the statute itself, the Sales Practices Act was adopted by the State of Utah to protect suppliers as well as consumers in a way which is not inconsistent with the federal consumer protection laws and regulations.

The Federal Trade Commission has promulgated certain rules concerning the sale of used motor Vehicles that is applicable in Utah generally and to this matter specifically. The form set forth in 16 CFR § 455.2(a) is exactly the form "Buyers Guide" which was used by K & K Sales in the sale of the Vehicle to Rawsons. (Appellants' Addendum, pages 3-4; R. 182-183.) That Regulation requires a dealer of used Vehicles to fill out, display and deliver a copy of the Buyers Guide to any purchaser of a used Vehicle. Defendants specifically and completely complied with the CFR requirements, specifying "**AS IS - NO WARRANTY**" and warning Rawsons of the "major defects that may occur in used motor Vehicles." (R. 187, ¶ 15(c); R. 203, ¶ 11(c); Deposition of James Rawson, R. 364-365, page 26 line 11 through page 30 line 17).

In State v. GAF Corporation, 760 P.2d 310 (Utah 1988), the Utah Supreme Court affirmatively declared that the Sales Practices

Act (Utah Code Ann. § 13-11-4) required an "intend to deceive" on the part of a supplier before a deceptive trade practice could be found. The 1995 change in language cited in Appellants' Brief chronologically followed the District Court's ruling in this case and is therefore irrelevant to this matter. Clearly there have been no factual allegations of nor attempts to show that any of the Defendants' intentions to deceive Rawsons. As far as "honesty in fact in the conduct or transaction concerned", there has been no allegation that Clark or any of the Defendants had any knowledge of any defect in the repair of the Vehicle prior to the sale of same to Rawsons. Rawsons merely assert (without any legal support) that as sellers of the Vehicle, Defendants had some unidentified duty to discover a latent defect. Rawsons have produced not a single case or statute burdening a seller with that responsibility.

Without any factual allegations asserted and any evidence offered in support of Rawsons' general claims under the Sales Practices Act, the District Court properly dismissed all Counts of the Amended Complaint related to the Sales Practices Act.

B. Rawsons failed to introduce any factual evidence to support their claim that Defendants violated the Motor Vehicle Reg. Act.

In Count III of their Amended Complaint and in their opposition to Defendants' Motions for Summary Judgment, Rawsons cited the Motor Vehicle Reg. Act, U.C.A. § 41-3-101 et seq., as a statute which Defendants allegedly violated in the sale of the Vehicle to Rawsons through allegedly deceptive and unconscionable conduct. Identically to their general references to the Sales

Practices Act, prior to the submission of the Appellants' Brief, Rawsons had never identified one act of Defendants which Rawsons claimed was violative of the Motor Vehicle Reg. Act. Accordingly, Defendants have always assumed that the gravamen of Rawsons' complaint was the allegedly fraudulent nature of Defendants' representations concerning the subject transaction. (R. 85-87).

Section 41-3-404 of the Motor Vehicle Reg. Act codifies the common law tort of fraud in connection with the sale of motor Vehicles and allows for limited recovery against a surety of the dealer. To show fraud or fraudulent representation, it is required of Rawsons to allege that a false misrepresentation was made by Defendants concerning an existing material fact **which was either known by Defendants to have been false or was made recklessly, knowing that they had insufficient knowledge upon which to base that representation**. Marchese v. Nelson, 809 F.Supp. 880, 890 (D. Utah 1993) (citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 800 (Utah 1991). The absence of any one element "is fatal to a claim of fraud." Jones v. Pingree, 273 P. 303, 305 (Utah 1928).

Rawsons have never made any effort to allege or demonstrate the requisite knowledge required of Defendants to elevate Defendants' admitted non-statement (omitting to tell Rawsons that the repairs were defective) to a viable element of fraud. Lacking fraud or fraudulent misrepresentation, the claims asserted by Rawsons are not violative of the Motor Vehicle Reg. Act.

Both parties admit knowledge of the accident to the Vehicle preceding K & K Sales' purchase of same. (R. 185, ¶8; R. 201, ¶4;

R. 202, ¶10; R. 361, pages 13-14). Both parties admit Rawsons had been informed orally and in writing that the Vehicle was a "salvage" Vehicle that had been rebuilt, repaired and restored. (R. 202, ¶10; R. 361, pages 13-14). The parties both acknowledge that Rawsons were given the opportunity to take the Vehicle to their own mechanic before purchasing it, and that neither party was aware of any defect in the repairs made to the Vehicle following the accident.[2] (R. 203, ¶12; R. 361, pages 14-15; R. 371, pages 17-18). All relevant information was fully disclosed prior to the closing of the transaction (Transcript R. 445 at pages 32-33). For the reasons set forth above, Rawsons have completely failed to allege or demonstrate any fraud in the transaction.

In their Appellants' Brief, for the first time in this litigation, Rawsons attempt to assert violations of Section 41-3-210 of the Motor Vehicle Reg. Act. At no time prior to the submission of their Brief did Rawsons even cite the statute upon which they spend most of their effort in their appeals argument. Issues concerning the identity of the party who placed the advertisement for the Vehicle, the location of showing the Vehicle, and similar undefined allegations in the Brief (R. at 16) were neither raised in the District Court nor argued on Defendants' Motions for Summary Judgment. (R. 200-213; R. 372-407). Such

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[2] Although solely for purposes of Defendants' Motion for Summary Judgment, the parties assumed that there were defects in the repair and restoration of the Vehicle; however, Defendants reserved their right to produce evidence at trial, if necessary, to show that the repairs made were in fact not below the standard of the industry and not dangerous to a passenger riding therein.

issues cannot now be raised for the first time on appeal. Park City Utah Corp v. Ensign Co., 586 P.2d 446, 450 (Utah 1978). Furthermore, because at no time in this matter have Defendants been the target of a formal claim or complaint for violating any of the provisions of §41-3-210, Defendants have never admitted that any of their actions violated that statute. (Contra, numerous assertions in Appellants' Brief at 1, 3, 11, 12, 13 etc.). Even assuming that Defendants had technically violated one or more of the prohibitions of §41-3-210, Rawsons have made no attempt to show that such a violation had a causal effect on any damages suffered by Rawsons. Section §41-3-404(1) limits the private right of action under the Motor Vehicle Reg. Act to circumstances where the plaintiff "suffers a loss or damage because of" the dealer's conduct.

Not coincidentally, in their Brief, Rawsons failed to refer to the applicable statute governing the sale of "salvage" Vehicles. Section 41-1a-1001 et seq. of the Utah Code governs the licensing and sale of motor Vehicles which have been "damaged by collision or flood or other occurrence." That statute allows the sale and purchase of such Vehicles rebuilt and restored to operation conditional upon the written notification to the purchaser that a "salvage certificate" or a "branded title" would be issued for the Vehicle. Such was the case in the present matter. With the Buyers Guide, the Purchase Agreement and the Dealer Registration Record, James K. Rawson signed instruments specifically designating "Utah Salvage Title," and "Rebuilt." (Appellants' Addendum 1-2, 3-4, 5). Defendants specifically and completely complied with all provisions

in the Utah Salvage Vehicle statute and Rawsons correctly omitted any allegations of violation thereof in their Amended Complaint.

C. Rawsons failed to introduce any factual evidence to support their claims other than those concerning breach of warranty.

In their Amended Complaint, Rawsons alleged eight separate causes of action: intent to defraud; tortious misrepresentation; deceptive and unconscionable acts and practices; breach of express and implied warranty; breach of covenants of good faith and fair dealing; liability of Old Republic [surety liability]; punitive damages [exempting Old Republic]; and equitable estoppel. In response to Defendants' Motions for Summary Judgment requesting dismissal of all claims, Rawsons submitted their memoranda contesting only the dismissal of Rawsons' claim for "breach of warranty" under the Utah Commercial Code. No contest or argument was made by Rawsons in the District Courts against Defendants' Motion to dismiss any other claims. Defendants and the District Court were left to assume that Defendants' argument as set forth in their submitted memoranda was sufficient to convince Rawsons, as well as the Court, that the claims based on fraud, tortious misrepresentation, deceptive and unconscionable acts, breach of covenants of good faith and fair dealing, punitive damages and equitable estoppel were without basis in law or fact. This Court should not hear argument now to these issues which was omitted in the District Court. Warburton v. Virginia Beach Federal Savings & Loan Assoc., 899 P.2d 779, 782 (Utah 1995). In his Order of October 4, 1996, Judge Brian found that "[Rawsons] failed to

introduce any evidence" to establish a claim against Defendants under any of the above-referenced theories. (R. 287-290).

II. THE DISTRICT COURT PROPERLY DISMISSED RAWSONS' CLAIMS FOR BREACH OF WARRANTY IN ITS ORDER OF MAY 28, 1998.

A. The disclaimer and exclusion of warranties found on the Buyer's Guide and the Purchase Agreement are valid and enforceable.

Following the entry of Judge Brian's Order of October 4, 1996, Rawsons had two Counts remaining from their Amended Complaint:

Count IV: Breach of Express and Implied Warranty; and

Count VI: Liability of Old Republic [Surety liability].

In Count IV of their Amended Complaint, Rawsons generally cited the UCC as a repository of unspecified law which Defendants allegedly violated. In fact, the UCC, at Utah Code Ann. § 70A-2-316(3), does provide significant assistance to the issue of the efficacy of the disclaimer of warranty set forth on the Buyers Guide signed and distributed by K & K Sales. That section provides:

> (a) unless the circumstances indicate otherwise, **all implied warranties are excluded by expressions like "as is,"** "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; . . .

It is not by coincidence that the specific language in the Buyers Guide includes the words "**AS IS - NO WARRANTY**" (Emphasis in original). Neither is coincidence that Rawsons failed to cite this provision in their Brief. This is also the language mandated by 16 CFR §455.2 described in the discussion concerning the Sales Practices Act, above. That language is also well within the parameters of the general rule for exclusion of warranties in Utah.

In Utah Power & Light Co. v. Babcock & Wilcox Co., 795 F.Supp. 1074 (D.Utah 1992), the Federal District Court acknowledged Utah's test of whether a disclaimer of warranty is effective to remove implied warranties is conspicuous and unambiguous nature of the disclaimer. Such a disclaimer cannot be any more conspicuous than that found on the Buyer's Guide. (Appellants' Addendum pages 3-4).

Defendants clearly and unambiguously informed Rawsons that there were no warranties and that if they purchased the Vehicle they did so understanding that they were purchasing the Vehicle in the condition they found it. In his deposition, Mr. Rawson testified that other than the three statements set forth in Statement of Fact No. 16 above, none of the Defendants made any "representations or warranties concerning the Vehicle." (Deposition of James Rawson, R. 368, page 41 line 18 through page 42 line 4). James Rawson further testified:

> Q: Did you consider any verbal statement by Mr. Clark as a warranty to you concerning the Vehicle?
>
> A: No.

Conover made no verbal statement to the Rawsons concerning the Vehicle. (R. 368, page 42 lines 11 through 14).

In support of their attempt to avoid the clear disclaimer language set forth in the various written documents signed by James Rawson at the time of the purchase of the Vehicle, Rawsons assert that the parol evidence rule should be suspended to allow oral statements conflicting with the written documents.

It is important to first review the alleged content of Clark's representations. In his Affidavit, James Rawson states, "Paul W. Clark advised my wife and myself that the Subject Vehicle had been involved in an accident, that it had been properly repaired and that it was safe and adequate for our intended use as a family Vehicle." (R 252, ¶ 4).

The written Purchase Agreement includes the language: "No agreement, verbal or otherwise, not contained in writing in this agreement on this document will be recognized." This type of integration clause is enforceable in Utah to exclude "evidence of terms in addition to those found in the argument." Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180, 190 (Utah App. 1997).

The parol evidence rule as set forth in the Utah Commercial Code provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> > (a) by course of dealing or usage of trade (Section 70A-1-205) or by course of performance (Section 70A-2-208); and
> >
> > (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Utah Code Ann. § 70A-2-202 (1990 Repl.). The integration clause in the Purchase Agreement places this written contract completely within the above statute.

Utah law is clear that to preserve the sanctity of a written document, the court will look to the four corners of the instrument to determine whether it is an integrated contract. Stanger v. Sentenel Sec. Life Ins. Co., 669 P.2d 1201 (Utah 1983). In absence of fraud, an apparently complete written agreement will stand on its own, without any supplementation or parol evidence. Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981). The written agreement containing all three written instruments (Appellants' Addendum 1-2, 3-4, 5) in the instant matter is clear and unambiguous in its express intent to be an integrated instrument, and the integrity of the document should not be disturbed absence a showing of fraud, of which there has been none.

B. The undisputed evidence shows that there were neither express or implied warranties made by Defendant to Rawsons concerning the Vehicle.

Rawsons have cited several cases in their Brief concerning the recognition by Utah courts of implied and express warranties. Defendants have no argument with the law stated in any of those cases. Defendants do strongly object to the misapplication of most of those cases to the facts in the present matter.

Defendants recognize that the sale of the Vehicle is covered by the UCC and that a covenant of good faith and fair dealing accompanies each similar transaction. Defendants also acknowledge that the extent of the representations allegedly made by Clark (the only Defendant supposedly making warranties to Rawsons) consisted of the following: "**that the Subject Vehicle had been involved in an accident, that it had been properly repaired and that it was safe**

and adequate for [Rawsons'] intended use as a family Vehicle." (R. 252, ¶4). Although Clark disputes even having made all of the preceding quote, Rawsons allege no other representations, warranties or puffing by any of the Defendants. (R. 368).

In analyzing the three representations which are the subject of Rawsons' Amended Complaint, we find the first was absolutely and indisputably true. The Vehicle had been involved in an accident. The second representation, if really made, was at least partially true, and completely accurate to Defendants' actual and reasonably imputed knowledge. The Vehicle had been repaired by third-party licensed professionals and had been inspected and approved by a state-certified safety inspector. (R. 203, ¶ 13; R. 213). The third representation was also true and accurate to Defendants' best knowledge. The Vehicle was safely employed by Rawsons for a period of four months and approximately 3,500 miles. The only evidence that Rawsons ever obtained to show the alleged unsafe condition of the Vehicle was discovered coincidental to repairs being performed upon the van subsequent to a second accident, which all parties concede was neither caused nor was in any way related to the original accident or repairs.

In conflict with Rawsons' allegations of oral misrepresentations are the clear and unambiguous written disclaimers. In exact accordance with the regulations published by the Federal Trade Commission, the sale of the Vehicle was accompanied by a document entitled "Buyers Guide" which included the clear and obvious language **"AS IS - NO WARRANTY"** in bold

capital-letter type. The Buyers Guide also contained the following warnings to Rawsons also as required by the Federal Trade Commission:

- o "IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form."
- o "YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the Vehicle."
- o "Vehicle is a rebuilt salvage Vehicle."
- o "PRE-PURCHASE INSPECTION: ASK THE DEALER IF YOU MAY HAVE THIS Vehicle INSPECTED BY YOUR MECHANIC EITHER ON OR OFF THE LOT."
- o "IMPORTANT: The information on this form is part of any contract to buy this Vehicle."

(Appellants' Addendum, pages 3-4).

Although Rawsons' understandably don't like the language of the Buyer's Guide, they cannot eliminate its effect by labeling the document as "semi-concealed or obscured self-protecting". That document, the exact language set forth therein and the size and boldness of all lettering thereof were specifically established by the F.T.C. in its published regulations. 16 C.F.R. § 455.2(a).

Of particular interest to the instant matter, by way of contrast, and not by similarity, is the case cited in Appellants' Brief: Conder v. A.L. Williams & Associates, 739 P.2d 634 (Utah App. 1987). There the sales contract contained clear disclaimer

language which, if standing alone, would have effectively removed any implied liabilities from the transactions. However, plaintiff there alleged and certified by a sworn affidavit that defendant's agent had told plaintiff that the disclaimer "was of no effect." Without that allegation by plaintiff, which went directly to the issue of the validity of the disclaimer, the disclaiming language would have been enforceable and plaintiff would have been found to have failed to state a legal claim.

In the instant case there are no allegations that any of the Defendants either minimized or asserted that the disclaimers in the Buyer's Guide were of no effect. Following the reasoning in Conder, the "**AS IS - NO WARRANTY**" language should be accorded its appropriate and understandable enforcement.

In Billings Yamaha v. Rick Warner Ford, 681 P.2d 1276, 1278 (Utah 1984), the Court stated that where the "disclaimer was in bold print on two different sales documents, one of which contained the limitation directly above the buyers' signatures", the disclaimers effectively limited the buyers' remedies.

It defies the undisputed facts and the clear statutory law for Rawsons to now claim a breach (which never occurred) of a warranty (which was never in existence). Judge Iwasaki was correct when he found that, "Based upon those two theories, number one, if warranties were in fact made, there was no material breach, and/or, number two, based upon the context of the negotiation and the sale, the defendants are now barred from raising any warranties due to the integration clause as well as their understanding and the plain

unambiguous language as of the "as is" and "no warranties" in the buyer's guide." (R. 445, Transcript at 33).

Finally, Count VI is completely dependent upon Count IV. If there is no breach of warranty, the surety can have no liability.

CONCLUSION

There are several contested issues of fact in this matter, but the determination of none of them were necessary for the Orders of Summary Judgment entered by the District Court. Because there were no genuine issues as to any **material** fact and because Defendants were entitled to summary judgment as matter of law, the District Court properly found (1) that Rawsons failed to introduce any evidence to sustain or support their claims of fraud, tortious misrepresentation, deceptive and unconscionable acts, breach of covenants of good faith and fair dealing, punitive damages and equitable estoppel; and (2) that Defendants made no material breach of any warranties concerning the Vehicle.

Defendants respectfully urge this Court to affirm the District Court's Orders on both of Defendants' Motions for Summary Judgment, dismissing all of Rawsons' claims against Defendants.

DATED this 16 day of February, 1999.

CALLISTER NEBEKER & McCULLOUGH

By: _____
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Defendants/Appellees

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEES was hand-delivered, on this 16th day of February, 1999 to the following:

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